Supreme Court, U.S.
FIL

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No. 97-559 SEP 25 1997

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In The
Supreme Court of The United States
October Term 1997

STEPHEN MICHAEL RIDDER
Petitioner.

v.

CITY OF SPRINGFIELD, et al.
Respondent.

On Petition For Writ of Certiorari
To the United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Whether an attorney can be sanctioned under 28 U.S.C. § 1927 for joining and maintaining tort claims against a municipality, such as Springfield, Ohio, where the highest court of Ohio has held in *Osborn v. Lyes*, 63 Ohio St. 3d 326 (Ohio 1992) that liability of a municipality for an officer can be predicated upon the principle of respondeat superior for a violation of civil rights or similar tortuous conduct in spite of the fact that there is no such theory of municipal liability now recognized under 42 U.S.C. § 1983.

Question 1A: Whether the Sixth Circuit Rule allowing sanctions against an attorney under 28 U.S.C. § 1927 without any showing of bad faith or similar conduct is in conflict with the other circuit courts (Second, Fifth, Seventh, Ninth, and Tenth, specifically) and is at odds with the Sixth Circuit's previous requirement for a showing of an intentional departure or reckless disregard for the orderly process of justice.

Question 1B: Whether an award of sanctions in the amount of $32,546.02 for attorney fees, pursuant to 28 U.S.C. §1927, is contrary to law, when the sanctioned attorney has exhibited a good faith basis in the claim and merely zealously represented his client in the pursuit of colorable claims under 42 U.S.C. §1983 and state law against a municipality whose officials failed to follow clearly defined policies and procedures important to evidence which was conclusively established evidence, held the sanctioned attorney's client in jail for four months.

Question 1C: Whether it is error to award full attorney fees for the entire defense of a municipality and its officers under 28 U.S.C. § 1927 when the fees have been denied pursuant to 42 U.S.C. § 1988, there is no hearing on same, and there is no evidence of what specific acts and the dates thereof, identifying the impermissible conduct and the sanctionable damages therefore.

PARTIES

1. For Petitioner: Stephen Michael Ridder, Plaintiff-Appellant.

2. For Respondents: City of Springfield, Ohio, Defendant-Appellee

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ADDITIONAL AUTHORITY:

42 U.S.C. §1988 .....*passim*

28 U.S.C. §1927 .....*passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, filed in Case No. 95-4220, March 14, 1997, is reported as *Ridder v. City of Springfield*, 109 F.3d 288 (1997), and reproduced at App. 1 of that Petition for Writ. The opinion of the United States Magistrate for the United States District Court for the Southern District of Ohio, Western Division at Dayton, filed in Case No. C-3-90-003, October 11, 1995, is unreported and reproduced at App. 26.

STATEMENT OF JURISDICTION

This matter arises out of the trial court's granting, on October 11, 1995, of a Motion for Sanctions filed by Respondent City of Springfield, Ohio (hereafter "Springfield"). Said Motion was filed pursuant to 28 U.S.C. §1927, 42 U.S.C. §1988, and Federal Rule of Civil Procedure 11. The United States District Court for the Southern District of Ohio had proper jurisdiction over the Motion pursuant to 28 U.S.C. §1343(a)(3). Jurisdiction over all parties existed, and venue was proper before the United States District Court for the Southern District of Ohio, Western Division at Dayton, pursuant to S.D.Ohio L.R. 3.3.

The case had been properly referred for adjudication by the United States Magistrate by Order of February 8, 1990.

The Decision and Order granting Springfield's Motion for Sanctions, based on Fed.R.Civ.P. 11, was entered against Petitioner's counsel, Dwight D. Brannon, by the United States Magistrate for the Southern District of Ohio, Western Division at Dayton, on October 11, 1995. Thus, the United States Court of Appeals for the Sixth Circuit had jurisdiction to entertain an appeal, which was brought pursuant to 28 U.S.C. §1291.

Petitioner filed a timely appeal with the United States District Court for the Southern District of Ohio, Western Division at Dayton, on November 9, 1995.

A final judgment was entered by Court of Appeals for the Sixth Circuit vacating the Order of the United States Magistrate to the extent that it imposed Rule 11 Sanctions, and affirming the decision insofar as it awarded attorney fees to Springfield pursuant to 28 U.S.C. §1927, on March 14, 1997.

Petitioner filed a timely Petition for Rehearing, which was denied on April 28, 1997. Thus, the Supreme Court of the United States has jurisdiction to review the judgment of the Sixth Circuit by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., amend IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause...

U.S. CONST., amend. XIV, § 1

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

STATEMENT OF THE CASE

As an initial important matter, Petitioner wishes to alert this Honorable Court to the fact that another Petition has been filed which concerns this case. The other Petition addresses the substantive merits of the case and seeks review of the Sixth Circuit's decision affirming the United States Magistrate's granting of summary judgment in favor of all Respondents. This Petition focuses on the Sixth Circuit's affirmance of the Magistrate's Order sustaining Respondent City of Springfield's Motion for Sanctions. Although the merits of the Petitioner's claims against Respondent Springfield are set forth more fully in the Petition on the merits, the facts concerning those claims will be discussed herein to the extent necessary to demonstrate the errors in affirming the grant of sanctions.

The underlying facts of this matter tell the tragic but familiar tale of a man accused of a crime he did not commit. While at work one summer day in 1988, the power saw that Stephen Ridder was operating became jammed, causing him to lose control of the saw. The saw tore through Ridder's left hand, nearly severing it completely. Ridder was rushed to the Mercy Hospital Emergency Room in Springfield, Ohio, where doctors reattached his severed hand. As Ridder sought treatment for his gruesome injury, Kim Carr, a hospital employee who had been the victim of a rape two years earlier, heard Ridder's voice and "thought" that it "sounded like" the voice of her attacker. When Ms. Carr notified law enforcement officials of this perception, the investigation of Stephen Ridder began.

Ridder subsequently underwent the first of a number of scheduled surgeries on the hand that had been severed and reattached. Because of the seriousness of the injury, in order for the hand to reattach and heal properly, intensive future medical treatment was required, including future surgeries and a three-times-per-week physical therapy regimen. This physical therapy was scheduled to take place at Miami Valley Hospital for an extended period of time, which included the entire time Ridder was eventually

incarcerated. The physical therapy facilitated the proper development and exercise of the muscles and tissues of the damaged limb, and served to prevent the formation of scar tissue prior to upcoming surgeries. Ridder received the regularly-scheduled therapy and had no scar tissue on his hand at the time of his arrest.

In their zealous efforts to convict a man they believed to be the wanted "Northern Estates Rapist", Springfield law enforcement officials ignored exculpatory evidence and omitted or ignored inconsistencies between the victim descriptions and their "evidence" allegedly implicating Stephen Ridder. In all, Ridder was ultimately charged on a fourteen (14) count Indictment: two (2) counts of kidnapping; two (2) counts of attempted rape; four (4) counts of rape; and four (4) counts of aggravated burglary, robbery, and felonious sexual penetration. These acts allegedly occurred between January 5, 1986, and July 5, 1988, in the areas surrounding Springfield, Sidney, and Wapakoneta, Ohio.

After receipt of the statement by Kim Carr and information supplied by an unidentified, uncorroborated informant, the investigation of Stephen Ridder was begun by Springfield Police Department Detectives Robert Kerr and Ronald Menda, Sergeant Robert Marcum and Chief of Police Roger Evans. The investigation included interviewing the alleged victims, showing the alleged victims a photograph of Ridder, and interviewing Ridder's former employer, Bob Mosier of Lawn Masters lawn care company.

Detectives Kerr and Menda came to Steve Ridder's home on September 8, 1988 and took Ridder to the police station for questioning. The detectives placed a stack of complaints from the rape victims in front of Ridder and asked him what he knew about the incidents described therein. In a taped conversation, Ridder answered that he knew nothing about the rapes. Ridder also told the detectives that he was living in Florida and Michigan at the times that some of the rapes took place, and gave them names of people he lived with and of employers they could contact. Furthermore, he told them that he did not return to Springfield until March of 1987, and that he was laid off from his job at Lawn Master lawn care service (a job which supposedly put Ridder in the area of the rapes) in November

of 1987. This evidence, given before Ridder was arrested and easily verifiable, would clearly eliminate Ridder as a suspect in most of the rapes. Detective Kerr testified that at the time the search warrant affidavit was made out, Ridder was the sole "target" of the investigation into the rapes - the possibility that someone else may have committed those horrible crimes was not considered.

After offering exculpatory evidence, Ridder took part in a suspect line-up. Ridder's attorney at the time told Ridder that they could resist the line-up, but knowing he was innocent of the crimes of which he was accused, Ridder agreed to stand in for the line-up. He felt that such an exercise would clear up the confusion and put an end to the nightmare that in fact, was only just beginning. All of the alleged victims were shown a photograph of Ridder before the line-up, but were not shown pictures of the other men. Thus, Ridder's was the only face that appeared in both the photographic array and the line-up. Even with this photographic suggestion that Ridder was the culprit, only five out of eight would identify Ridder as the possible rapist. None of the victims could positively say for sure that Ridder was the man who attacked them and two of the women identified jail employees. After the sham line-up, Ridder was arrested and placed in the Clark County Jail.

The day after his arrest, Ridder requested that Detectives Kerr and Menda meet with him at the jail. Ridder again told the detectives that he was innocent and that he in fact was in Florida and Michigan, in various towns, at the time of many of the alleged rapes. Following this conversation, the detectives never bothered to talk to Ridder again, nor did they check public records or sources readily available to them. Some of Ridder's former employers, such as Florida Steel, were not even contacted by the Springfield Police. Also, Ridder's alibi that he was living in Michigan at the time of some of the rapes was not checked into because Ridder's brother, with whom he lived and worked while in Michigan, was accused of being a "big time" drug dealer by Ridder's stepmother. On the day after Ridder's arrest, Detective Menda received a call from George Kirby, Ridder's step-father, in which Kirby explained that Ridder was with him during a couple of the alleged rapes. Menda did not follow up on the call.

According to the detectives, Ridder's employment with Lawn Master had linked him to the area in which the rapes had occurred. However, the fact that Ridder's date of hire with that company was not until April 3, 1987 was apparently overlooked. This fact demonstrates that Ridder was not in fact present in the area, with knowledge of the neighborhoods (the prosecution's link), until after four of the rape incidents had occurred.

Furthermore, according to Detective Menda, after the line-up and after charges were filed, he and Detective Kerr learned that Ridder had been in jail in Florida the night of January 5, 1986, the night upon which he had been accused of raping Katherine Davis. Menda also admitted that with the information in his possession at that time, he "would have an obligation" to know that Ridder was in jail on January 5, 1986. Menda further agreed that if strong evidence exists that a person could not have been present at the scene of a crime, that person can be eliminated as a suspect. According to Menda, the information he had concerning Ridder's whereabouts at different times eliminated Ridder as a suspect in one alleged rape.

The rapes of which Stephen Ridder was accused clearly had a common *modus operandi*.. The elimination of a person as a suspect in one rape, that is part of a series of rapes with a common *modus operandi*, necessarily eliminates him as a suspect in the others.

Menda admitted that there existed deficiencies and omissions in the search warrant affidavit, when compared to the actual police reports and victim descriptions. The affidavit did not indicate that Ridder was living in Michigan at the time of some of the rapes, although law enforcement officials were aware of that fact at the time. The affidavit made no mention of Ridder's Florida residence or incarceration either, although this information was known as well. In the affidavit account of Kim Carr's second attack, Carr's description of her attacker as having a mustache was omitted. In the affidavit version of the attack on Judy Sutton, the attacker supposedly placed duct tape over Sutton's mouth and/or eyes, but Sutton never said that duct tape was used on her. All of the warrant affidavit descriptions omit hair color. All of these important facts were in the police reports and were therefore known by

Respondents Marcum, Menda, and Kerr. Menda stated that it was the custom of the Police Department "to not rely on what you are saying there on these complaint sheets," despite the exculpatory evidence contained therein. In other words, it was the department's custom to ignore descriptions not compatible with those of their target suspect.

On September 8, 1988, pursuant to the search warrant issued by Clark County Common Pleas Judge Gerald F. Lorig, Ridder provided samples of his head hair, pubic hair, saliva, and blood to a technician of the Springfield Police Department lab, so that DNA testing, then a much newer and less famous method of forensic testing, could be done. The samples were provided to Cellmark Diagnostics in Maryland. The results of the testing were not made known until four months later.

According to Detective Kerr, the Respondents did not even request an FBI report on Ridder until December of 1988, three months after he had been arrested. As admitted by the detectives, the first thing an objective police officer does in an investigation of this nature is retrieve and review a prisoner's records of arrest and incarceration. This was also pointed out by Ridder's proposed expert witness, Richard Emmons. A serious question of fact exists as to when the Respondents received the information contained in the FBI report (i.e. Ridder's incarceration in Florida, which precluded him as a suspect in one rape). The FBI report was dated October 22, 1988. There is no explanation as to why the information was not requested earlier, and it is not clear when it was requested. It is unclear whether the information was possessed by the Respondents but ignored. It is clear, however, that the detectives were aware of Ridder's Florida incarceration much earlier.

On December 2, 1988, at Ridder's request, a Lieutenant Ayers and Sergeant Marcum spoke with Ridder. The result of this conversation was a memo which was given to officers in which they were advised of things to "check out." At the meeting, the officers advised Ridder that they ought to work out a plea agreement. Ridder was still waiting on the DNA results, which, just as Respondents believed would seal Ridder's fate, Ridder knew would finally clear his name. All the while, however, Ridder was suffering agonizing physical debilitations which became permanent,

serious deformities and disabilities because the Ridder did not receive adequate medical care at the Clark County Jail.

The long and complicated procedural history of this case is discussed in the Petition on the merits, filed simultaneously with this Petition. Following five years of machinations of counsel, open displays of hostility and impatience by the Magistrate toward the Petitioner and counsel, and exhausting procedural wrangling, the Magistrate granted summary judgment as to all Respondents and against the Petitioner on all claims on February 28, 1995. Respondent City of Springfield then filed a Motion for Sanctions on March 28, 1995.

Respondent Springfield's Motion for Sanctions requested sanctions against the Petitioner's counsel[1] on three grounds: (1) pursuant to Fed.R.Civ.P.11 as amended December 1, 1993, that the Petitioner failed to present evidence of a pattern of conduct which amounted to a custom, policy, or usage of the City of Springfield which deprived the Petitioner of his civil rights; (2) pursuant to 28 U.S.C. §1927, that counsel's actions in pursuing the case over a five (5) year period amounted to an unreasonable and vexatious multiplication of litigation; and (3) pursuant to 42 U.S.C. §1988.

On April 18, 1995, the Petitioner moved the Magistrate to stay decision on Respondent Springfield's Motion for Sanctions, pending the Sixth Circuit's ruling on the appeal of the Magistrate's Order granting summary

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[1] The Petitioner wishes this Court to note that the Magistrate sanctioned Dwight D. Brannon, one of the Petitioner's counsel of record. The Magistrate specifically levied no sanction against the Petitioner's co-counsel, Jose M. Lopez, as it found essentially that Mr. Lopez was not a participant in the conduct the Magistrate found violative of Fed.R.Civ.P. 11 and 28 U.S.C. §1927. The Court omitted Mr. Lopez from its findings even though Mr. Lopez was the originating attorney, refering it to Mr. Brannon and co-counseling the case through the discovery and pleading process. Accordingly, Mr. Lopez was not involved in the appeal of the sanctions award in the Sixth Circuit, and is not involved in seeking review in this Honorable Court. The direction of the ssanctions against only Brannon is a good indication of the Magistrate's personal bias in the case for whatever unknown reason.

judgment to all Respondents. The Magistrate denied this Motion by Order of April 20, 1995.

The Petitioner then filed a Memorandum in Opposition to Respondent Springfield's Motion on May 1, 1995, citing the Magistrate to numerous instances in which the Petitioner, in pleadings and through discovery, had placed before the court evidence of violations of his civil rights and Respondent's liability therefor. The Petitioner also set forth argument as to why simply pursuing valid civil rights claims against the City did not amount to the vexatious and unreasonable multiplication of litigation. Furthermore, the Petitioner pointed out that Respondent Springfield had admitted in its Motion that it had not complied with the mandatory language of Fed.R.Civ.P. 11(c)(1)(A), in failing to serve a proposed copy of the pleading to the Petitioner's counsel asking them to withdraw the allegedly offensive and baseless claims for relief brought against the City. Respondent Springfield did not file a Reply Memorandum, or in any way attempt to buttress its Motion for Sanctions.

On October 11, 1995, the Magistrate ruled on the Motion for Sanctions. The Magistrate denied relief to Respondent City of Springfield on the basis of 42 U.S.C. §1988, finding that Respondent's Motion for Sanctions had not been timely filed, according to Fed.R.Civ.P. 54(b) and (e). However, the Magistrate sustained the Motion for Sanctions on the other two grounds, alternatively. The Magistrate held that the Petitioner had never produced evidence sufficient to prove a civil rights claim against the City, finding that the Petitioner had not demonstrated that the Springfield police officers involved in the criminal case against the Petitioner had acted pursuant to an official custom, policy, or usage of the City of Springfield. Furthermore, the Magistrate found that Respondent City of Springfield's failure to comply with the mandates of Fed.R.Civ.P. 11(c)(1)(A) was in effect harmless error, as compliance would have been but an "empty formality." That judgment by the Magistrate directly contradicted his strict enforcement and retroactive application of Fed.R.Civ.P. 26(a)(2) against the Petitioner in his case-in-chief. The alleged non-compliance with Rule 26, as amended December 1, 1993 (nearly four (4) years after the inception of the instant litigation) formed the basis, in part, for sustaining the

Respondents' Motions for Summary Judgment. Finding that the Petitioner's counsel had vexatiously and unreasonably multiplied the litigation, the Magistrate rendered judgment against the Petitioner's counsel, Dwight D. Brannon, in the amount of $32, 546.02.

In the judgment, the Magistrate prejudically referred to the standing of Petitioner's lawyer as being one of the most financial successful plaintiff's lawyers and being able to afford the sanction. Further, in spite of the fact that attorney fees had been denied Respondent under § 1988, the Magistrate proceeded to award a sanction in exactly the same amount as the entire attorney fees the City had expended for the defense of the officers, individually, as well as in its capacity. There was no hearing upon the award, whatsoever, as to the basis, scope, reason, or amount of the sanction.

The award of sanctions was then appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit vacated the Magistrate's Order insofar as it awarded sanctions pursuant to Fed.R.Civ.P. 11, because the City had failed to comply with the procedural prerequisites specifically mandated in the Rule. However, the Sixth Circuit affirmed the decision of the Magistrate in that the attorney fees awarded were done so properly, pursuant to 28 U.S.C. §1927. The Sixth Circuit agreed that the Petitioner's counsel had unreasonably and vexatiously multiplied the proceedings by pursuing the claims against the City. The Petitioner now respectfully requests that this Petition be granted so that this Honorable Court may review the decision of the Sixth Circuit, which contradicts decisions of other Circuits, and the Sixth Circuit itself, concerning the imposition of sanctions.

ARGUMENT

It is the contention of the Petitioner that the draconian award of sanctions granted by the United States Magistrate and affirmed by the Sixth Circuit in this matter was clearly erroneous, contrary to law, and in conflict with the standards set forth by other Federal Circuits for imposing sanctions

under 28 U.S.C. §1927. Essentially, sanctions were levied against the Petitioner's counsel personally for refusing to abandon claims against the City of Springfield brought under 42 U.S.C. §1983 and the pendent state claim under *Osborne v. Lyles*, 63 Ohio St. 3d 326 (Ohio 1992). According to the Magistrate and contrary to the evidence, the Petitioner had produced no evidence whatsoever which could establish that the Springfield police officers acted pursuant to a policy of the City of Springfield in prosecuting the Petitioner or that no state law provided for respondeat superior liability. Once the Magistrate had made that determination, he ruled that in pursuing the claims against Springfield, the Petitioner's counsel had unreasonably and vexatiously multiplied the litigation. Therefore, $32,546.02 in sanctions were levied as punishment for maintaining claims against Springfield without evidence to support those claims. The sanction was for attorney fees from the day Respondent was joined as a defendant in the case. The decision ignored prior decisions of the Magistrate overruling Motions to Dismiss and/or summary judgment by the Respondents. Nowhere, did the Magistrate find any bad faith or similar misconduct on the part of counsel.

The Petitioner first argues, based also upon his Petition on the merits of this case, that there existed sufficient evidence to maintain a colorable claim against Springfield under §1983. If the Petitioner was found to have met the requirements of §1983, the Magistrate's imposition of sanctions for pursuing a wholly baseless claim would be clearly erroneous as it was based upon a supposed egregious failure to meet those requirements. As such, were the Court to rule in favor of the Petitioner on the merits, a ruling in favor of the Petitioner and counsel concerning the sanctions would necessarily follow. Further, the Court failed to consider the law of respondeat superior liability under the state law.

Furthermore, the Petitioner asserts that counsel's conduct in this litigation did not warrant the imposition of sanctions pursuant to 28 U.S.C. §1927. In affirming the decision of the Magistrate, the Sixth Circuit has issued an opinion which conflicts with the decisions of other circuits defining the standard of sanctionable conduct under the federal statute. The imposition of sanctions, particularly in an amount as large as those at issue herein, significantly affects the substantial rights of the sanctioned party. The members of the bar are entitled to a clear standard as to what conduct will be deemed to have "unreasonably and vexatiously" multiplied litigation. The standard of review enunciated by the Sixth Circuit in this case conflicts with its previously enunciated standard, both of which are in conflict with the decisions of other circuit courts of appeal.

When presented with the evidence and law adduced through the pleading stage of this proceeding, the Magistrate granted summary judgment in favor of all Respondents. Zealous representation of one's client, through the relentless pursuit of colorable claims, does not amount to sanctionable conduct under 28 U.S.C. §1927, nor does it become so if those claims are unsuccessful.

QUESTION 1: Whether an attorney can be sanctioned under 28 U.S.C. § 1927 for joining and maintaining tort claims against a municipality, such as Springfield, Ohio, where the highest court of Ohio has held in *Osborn v. Lyes*, 63 Ohio St. 3d 326 (Ohio 1992) that liability of a municipality for an officer can be predicated upon the principle of respondeat superior for a violation of civil rights or similar tortuous conduct in spite of the fact that there is no such theory of municipal liability now recognized under 42 U.S.C. § 1983.

Question 1A: Whether the Sixth Circuit Rule allowing sanctions against an attorney under 28

U.S.C. § 1927 without any showing of bad faith or similar conduct is in conflict with the other circuit courts (Second, Fifth, Seventh, Ninth, and Tenth, specifically) and is at odds with the Sixth Circuit's previous requirement for a showing of an intentional departure or reckless disregard for the orderly process of justice.

Question 1B: Whether an award of sanctions in the amount of $32,546.02 for attorney fees, pursuant to 28 U.S.C. §1927, is contrary to law, when the sanctioned attorney has exhibited a good faith basis in the claim and merely zealously represented his client in the pursuit of colorable claims under 42 U.S.C. §1983 and state law against a municipality whose officials failed to follow clearly defined policies and procedures important to evidence which was conclusively established evidence, held the sanctioned attorney's client in jail for four months.

Question 1C: Whether it is error to award full attorney fees for the entire defense of a municipality and its officers under 28 U.S.C. § 1927 when the fees have been denied pursuant to 42 U.S.C. § 1988, there is no hearing on same, and there is no evidence of what specific acts and the dates thereof, identifying the impermissible conduct and the sanctionable damages therefore.

Whether an award of sanctions in the amount of $32,546.02 for attorney fees, pursuant to 28 U.S.C. §1927, is contrary to law, when the sanctioned attorney has merely zealously represented his client in the pursuit of colorable claims under 42 U.S.C. §1983 and state law against a municipality whose officials failed to investigate known

exculpatory evidence, omitted such known exculpatory evidence and despite such known exculpatory evidence, held the sanctioned attorney's client in jail for four months, causing him serious medical injury because of deliberate indifference to his medical needs.

An action brought under 42 U.S.C. §1983 must contain 3 basic components: (1) a right secured by the United States Constitution and; (2) a violation of that right; (3) by a person acting under color of state law. *Paul v. Davis*, 424 U.S. 693, 699-701 (1976). In addition, a §1983 claim against a municipality requires a plaintiff to establish that the acts of municipal officers which allegedly violated the plaintiff's rights, were done pursuant to a custom or policy of the municipality. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694-695 (1978).

The Petitioner has established the basic elements of a §1983 action against Respondent City of Springfield. The city and its police officers were clearly state actors acting under color of state law throughout the criminal prosecution of the Petitioner. *See Monroe v. Pape*, 365 U.S. 167, 171-172 (1961). The Petitioner claimed violations of his constitutional rights guaranteed by the Fourth Amendment which protects persons from illegal searches and seizures, and from malicious prosecution. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965) (malicious prosecution is actionable under the Fourth Amendment). The Petitioner also raised claims of violation of his due process rights via the Fourteenth Amendment, and of cruel and unusual punishment in violation of the Eighth Amendment (made applicable to the states through the Fourteenth Amendment, *see Robinson v. California*, 370 U.S. 660 (1962)).

Furthermore, the Petitioner has adduced evidence demonstrating an unconstitutional policy of the City of Springfield which attaches §1983 liability to the City for the

violations of the Petitioner's civil rights. It was ignored that some of the alleged rapes had entirely different *modus operandi* , so that they could be linked and later attributed to one suspect. The police had knowledge of and were in possession of evidence which weighed against the possibility that the Petitioner committed the rapes. They failed to investigate this evidence and it was conspicuously absent from the search warrant affidavit. The complaint sheets filled out by the alleged victims, which gave physical descriptions of their attackers, differed greatly as to the rapists' characteristics, most describing men with nothing physically in common with the Petitioner.

The Petitioner provided the police with out-of-state addresses, as well as the names of companions and employers who could verify the Petitioner's presence out-of-state at the time of several of the crimes he was accused of committing. There were public records which cleared the Petitioner of at least one of the alleged rapes. Despite all of this information, the Springfield police still pursued the Petitioner as the man suspected of committing all of the rapes.

The Petitioner asserted that the totality of the above circumstances amounted to conduct so egregious that an informal policy could be inferred whereby the department stopped at nothing to achieve an arrest of its target suspect. Also, Detective Menda admitted that the department made it routine practice to ignore the descriptions in the complaint sheets provided by crime victims. The fact that men other than the Petitioner had committed the crimes for which he was charged was immaterial once the department "had its man."

Of extreme importance, and as pointed out in the Petition on the merits of this case, the Petitioner also asserted a state law claim against Springfield based on respondeat superior liability. *Osborne v. Lyles*, 63 Ohio St.3d 326. The trial court had the power to adjudicate this claim

pursuant to 28 U.S.C. §1367, and not solely under §1983 but the common law of Ohio. This claim provided the Petitioner with another reason to name and keep Springfield in the suit, and another reason why doing so did not unreasonably or vexatiously multiply the proceedings. Indeed, Springfield and its officers defended the case as one and the same.

The Respondents exercised a policy which amounted to ignoring exculpatory evidence, and failing to investigate known alibis in order to imprison their target suspect. Through the execution of this policy, the Respondents violated the substantive due process rights of the Petitioner, falsely imprisoning him and adversely affecting his life forever.

Furthermore, the imposition of sanctions pursuant to 28 U.S.C. §1927 was error. The statute provides that in certain situations, any attorney may be required by a court to personally satisfy any excess costs, expenses and attorney fees reasonably incurred by an opponent. This punitive measure is limited, however, to situations in which counsel "unreasonably and vexatiously" multiplies litigation. In the case at bar, the Petitioner's counsel was found to have violated the statute, and ordered to pay Springfield $32,546.02 in attorney fees for joining Springfield from day one.

The awarding of sanctions under 1927 is within the discretion of the trial court, but cannot stand where that discretion has been abused. *Re Cohoes Industrial Terminal, Inc.*, 931 F.2d 222 (2d Cir. 1991); *Indianapolis Colts v. Baltimore*, 775 F.2d 177 (7th Cir. 1985). The Magistrate abused his discretion in awarding sanctions in the case at bar. Maintaining the claims against Springfield did not rise to the level of improper conduct that the statute requires. the sanctions awarded herein are a manifestation of the Magistrate's impatience with the litigation and personal ill will toward the Petitioner's counsel.

As this Honorable Court has pointed out, §1927 only applies to conduct which unreasonably and vexatiously multiplies proceedings, and its goal is to control abuses of judicial processes. *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

The Second Circuit has established that imposing sanctions under this statute is very unusual and requires a clear showing of bad faith. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied* 404 U.S. 871 (1971); *see also Baker Industries, Inc. v. Cerberus, Ltd.*, 764 F.2d 204 (3d Cir. 1985); *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626 (9th Cir. 1987). In some instances, subjective good faith may excuse even otherwise unreasonable conduct. *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987). However, the Sixth Circuit has recently ruled that bad faith is not necessary to sustain an award of sanctions under the statute. *Runfola & Associates v. Spectrum Reporting II*, 88 F.3d 368 (6th Cir. 1996).

Section 1927 is punitive in nature and must be strictly construed. *Monk v. Roadway Express, Inc.*, 599 F.2d 1378 (5th Cir. 1979), *affirmed* 447 U.S. 752 (1980). In so construing, the Sixth Circuit itself has held that attorneys should be held personally responsible only where there exists an intentional departure from proper conduct, or, at least, a reckless disregard of counsel's duty to the court. *United States v. Ross*, 535 F.2d 346 (6th Cir. 1976).

The Ninth Circuit has held that conduct cannot be sanctionable under this statute, absent a finding that such conduct was willful, intentional reckless, or in bad faith. *United States v. Austin*, 749 F.2d 1407 (9th Cir. 1984). Similarly, the Tenth Circuit has mandated that the statute is only to be utilized in situations presenting a "serious and standard disregard for the orderly process of justice." *Dreiling v. Peugeot Motors of America, Inc.*, 768 F.2d 1159

(10th Cir. 1985); *see also Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163 (7th Cir. 1969), *cert. denied*, 395 U.S. 908 (1968).

Pursuit of a claim with an arguable legal basis should not be sanctioned. *Smith v. Our Lady of Lake Hospital, Inc.*, 960 F.2d 439 (5th Cir. 1992). It is clear that sanctions under the statute are proper only in situations containing purely baseless and frivolous claims, or egregious misconduct that deliberately disregards the duty of counsel to the court.

In the instant case, the Petitioner's counsel was faced with the facts, as set forth above and in the Petition on the merits. He was faced with federal and state law governing the Petitioner's claims against Springfield. There is simply no evidence of willful abuse of the judicial process, or intentional harassment, bad faith, or any of the similar terminology used by courts.

The Petitioner was entitled to his day in court. In a case with injuries as severe as the Petitioner's, and where someone is prosecuted so vigorously for crimes that he obviously did not commit, it is unfathomable that the Petitioner suffered summary judgment. Civil rights plaintiffs face the daunting task of proving claims against public officials and governments. Power corrupts, and although government in this country is of the people, by the people and for the people, governmental power is often abused. When civil rights are violated, few public officials or government employees come forward with a "smoking gun" detailing how they conspire to violate people's civil rights. The inherent difficulties of proving the existence of an unconstitutional informal policy are exacerbated by the conspiratorial nature of the complained of conduct. Where government abuses the system, takes advantage of its power, and individual's rights are made to suffer, it is the function of the law to protect those rights. The courts are the arena in which individuals may pursue their claims, often

fighting tooth and nail for their rights. One must wonder what effect decisions such as those appealed from herein may have on the ability and willingness of civil rights plaintiffs to pursue these onerous claims.

The sanctions statute necessarily places a very high hurdle in front of those who wish to invoke it. The good faith pursuit of colorable claims does not appear to clear that hurdle. The statute and the federal case law under it suggest that much more is required than what existed in this case. The decision of the Sixth Circuit at issue herein muddies the waters and sets forth that the good faith pursuit of colorable claims may be sanctionable.

The members of the bar must have clear direction as to when their conduct will likely be found to violate the statute. If attorneys are in danger of being ordered to satisfy judgments as large as the one at issue herein, they deserve to have clear guidelines, demonstrating to them when their conduct will be judged to be "out of bounds." The discrepancies among the circuits make it unclear what conduct will be sanctionable. The Petitioner and counsel respectfully request that this Honorable Court provide clarity to this murky situation.

Furthermore, the Petitioner points the Court to other matters raised in the Petition on the merits. The draconian sanctions award typifies the conduct of the Magistrate in the case at bar. Through the course of the proceedings, the Magistrate became increasingly impatient, displaying open hostility toward the Petitioner's counsel, and going so far as to mock counsel's pleading style. The Magistrate made conflicting and controversial rulings which completely eviscerated the Petitioner's case, leaving him vulnerable to summary judgment after originally overruling summary judgment. The Magistrate's growing frustration and personal ill will towards the Petitioner's counsel erased his ability to render an impartial judgment in this matter. Finally, the imposition of sanctions amounted to a final

opportunity to chastise counsel for some perceived personal flaw. The decision, itself, was inappropriate in substance and form.

For the foregoing reasons, Plaintiffs respectfully request that the Petition for Writ of Certiorari be granted. Plaintiffs' request is based on the argument set forth *supra*, especially the conflict between the Sixth Circuit's decision in this case and conflicting decisions of the Sixth and other Circuits regarding conduct that warrants the imposition of sanctions. It is critical and in the best interest of the people and the legal system of the United States, that uniformity in this regard be achieved.

The specter of draconian sanctions, such as those imposed in the instant case, should not loom over counsel zealously representing their clients, without clear guidelines as to what type of conduct will be sanctionable. Particularly, in civil rights cases, where plaintiffs face the daunting task of proving conspiratorial claims against government, the aggressive pursuit of colorable claims should not be punished.

The Petitioner was wronged. He served four months in jail for crimes he did not commit, where known serious injuries went untreated. Because of the acts of Springfield and the other Respondents, the Petitioner has suffered greatly, and will never be the same, emotionally or physically. Petitioner's counsel refused to eliminate a party responsible for the Petitioner's suffering from the suit. There exists evidence that Springfield, through its police officers, violated the Petitioner's civil rights. The relentless pursuit of a colorable claim of civil rights violations, even if unsuccessful, does not satisfy the requirements of 28 U.S.C. §1927, nor does it deserve such drastically punitive measures.

As the decisions demonstrate, in another Circuit, counsel's refusal to back down may have been deemed acceptable, even admirable. The conflict suggests to civil

rights plaintiffs, and to each member of the bar, for that matter, that zealous representation of a client may be prohibited or applauded, depending upon where the claim arises. Finally, were the Court to rule in favor of the Petitioner on the merits, the award of sanctions therefore could not stand. Consequently, Petitioner prays that this Honorable Court grant Certiorari in the case at bar.

Respectfully Submitted,

DWIGHT D. BRANNON & ASSOCIATES

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Dayton, OH 45475-0425
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served upon Leo F. Krebs, Esq., Attorney for Respondent Lawrence, Suite 400, National City Center, 6 North Main Street, Dayton, Ohio 45402; Edward J. Dowd, Esq., Attorney for Respondents Clark County, Ohio, and Gene Kelly, 205 East First Street, Dayton, OH 45402; John R. Butz, Esq., Attorney for Respondents Evans, Marcum, Menda, and Kerr, 125 East McCreight Avenue, Springfield, OH 45504; and Robin N. DeBell, Esq., Attorney for Respondent City of Springfield, 76 East High Street, Springfield, OH 45502; by regular U.S. mail this 25 day of September, 1997.

Dwight D. Brannon

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI

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* UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT, WESTERN DIVISION

No. 95-4220

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN MICHAEL RIDDER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL from
	)	the United States
CITY OF SPRINGFIELD,	)	District Court for the
	)	Southern District of
Defendant-Appellee,	)	Ohio
	)	
CLARK COUNTY, et al.	)	
	)	
Defendants.	)	

Decided and Filed March 14, 1997

Before: SUHRHEINRICH and MOORE, Circuit Judges; McKINLEY, District Judge*

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*The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

KAREN NELSON MOORE, Circuit Judge. In this appeal we are asked to determine the propriety of sanctions under FED. R. CIV. P. 11, as amended in 1993, when a motion

for sanctions is filed without satisfying the requisite "safe harbor" period and after a court has entered summary judgment. Following a protracted civil rights litigation resulting in summary judgment for defendants on all claims, Defendant City of Springfield moved for sanctions against Plaintiff Stephen M. Ridder's counsel, Dwight D. Brannon, pursuant to Rule 11 and 28 U.S.C. § 1927, without first serving the motion on plaintiff's counsel for a "safe harbor" period as instructed by the 1993 Amendments to Rule 11. Agreeing with Springfield's contention that over the five-year litigation period Ridder had failed to put forth any evidence of a proper basis for municipal liability, the magistrate judge imposed sanctions in the form of a $32,546.02 fine against Ridder's counsel. As explained below, we disallow the Rule 11 sanctions because Springfield failed to comply with the rule's explicit procedural prerequisite. Springfield is entitled to $32,546.02 in attorney fees,[1] however, under § 1927 insofar as Ridder's counsel unreasonably and vexatiously

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[1] We appreciate the effort to resolve for the circuit the stylistic dilemma of whether to use "attorney fees," "attorneys fees," "attorney's fees," or "attorneys' fees" found in footnote one of *Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252 (6th Cir. 1997). Whereas the statute at issue in *Stallworth*, 28 U.S.C. § 1447(c),, uses "attorney fees," the statute we interpret, 289 U.S.C. § 1927, uses "attorneys' fees," while the text of Rule 11 employs both "attorney's fees" and "attorneys' fees" in various subsections. As our sources are divided, we have surveyed the landscape and conclude that "attorney fees" is an acceptable form, analogous to "counsel fees" or "expert witness fees." *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 91 (2d ed. 1995) (recognizing that "attorney fees," though inelegant, is increasingly common). Finding uniform terminology advantageous, we shall adhere to *Stallworth's* use of "attorney fees."

multiplied the proceedings. Therefore, we affirm the magistrate judge's order awarding fees.

I. BACKGROUND

In January 1990, Stephen M. Ridder commenced an action under 42 U.S.C. § 1983 against the City of Springfield, Ohio, and other defendants as a result of his arrest and pre-trial incarceration for a number of rape and related charges. Compl.; J.A. at 34. Ridder essentially alleged that the actions of Springfield police officers in withholding from a search warrant affidavit inconsistent information given by various rape victims and in failing to investigate fully Ridder's alibis deprived Ridder of his constitutional right to due process of law. *See* Third Amend. Compl. at 16-38; J.A. at 183-205.

The events that formed the basis of Ridder's suit stemmed from a series of rapes that occurred in and around Springfield between January 1986 and July 1988. In July 1988, Ridder's hand was nearly severed in an industrial accident. While physicians reattached his hand, a hospital employee identified Ridder's voice as that of her attacker. Police began investigating Ridder. He could be placed in the general location at the time of several of the rapes, and five of eight victims identified him in a lineup. Pursuant to a fourteen-count indictment, Springfield police officers arrested Ridder on September 8, 1988. He was detained in the Clark County Jail from then until January 4, 1989, when DNA tests exonerated him. Ridder was released from jail on January 4, 1989, and all charges against him were later dropped.

On January 4, 1990, Ridder filed a complaint against the City of Springfield, Clark County, Prosecutor Stephen

A. Schumaker, Clark County Sheriff Gene A. Kelly, Springfield Chief of Police Roger Evans, Sergeant Robert Marcum, Detectives Ronald Mendah [sic] and Robert Kerr, and Dr. Walter Lawrence alleging several causes of action pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1985, and state law. Compl.; J.A. at 34. The assigned magistrate judge, Michael R. Merz, noted several pleading deficiencies as to who was being sued for what and gave Ridder an opportunity to amend the complaint. Decision, Sept. 10, 1990; J.A. No. 95-3358 at 412-15. On October 1, 1990, Ridder filed an amended complaint. First Amend. Compl.; J.A. at 56. The magistrate judge subsequently dismissed most claims in the amended complaint as failing to state a claim upon which relief could be granted or as barred by qualified immunity. Decision, March 4, 1992; J.A. No. 95-3358 at 455.

Ridder then obtained to leave to file a second amended complaint, which he filed on May 11, 1992. Second Amend. Compl.; J.A. at 105. With respect to this complaint, the magistrate judge granted a defense motion for a more definite statement, noting that "still the Court is faced with a pleading that is not explicit about who is being sued for what." Order, June 10, 1992; J.A. No. 95-3358 at 481. The magistrate judge also decided sua sponte that the filing of the second amended complaint constituted a violation of 28 U.S.C. § 1927 in that it multiplied proceedings vexatiously and unreasonably. Order, June 10, 1992; J.A. No. 95-3358 at 481-82. This § 1927 ruling, however, never became final as the magistrate judge granted Ridder leave to file a third amended complaint. *See* Order, Aug. 17, 1993; J.A. No. 95-3358 at 650-52.

Ridder filed his third amended complaint on August 17, 1993. Third Amend. Comp.; J.A. at 168. In the intervening period, the Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), held that a civil rights complaint alleging municipal liability cannot be subject to a heightened pleading standard. Recognizing *Leatherman's* effect on Ridder's municipal liability claims, the magistrate judge deemed the third amended complaint sufficient for Ridder's case to progress beyond the pleading stage. Decision, Jan. 24, 1994; J.A. No. 95-3358 at 348.

Proceeding on the basis of the third amended complaint, the parties undertook discovery throughout 1994. Near the end of that year, Springfield moved for summary judgment. Motion; J.A. at 422. Even assuming that the Springfield police officers deprived Ridder of a constitutional right, the magistrate judge found that Ridder offered no evidence that the officers acted pursuant to any policy, custom, or usage of the City of Springfield, as required by *Monell v. Department of Social Servs.*, 436 U.S. 658, 690 (1978). Decision, Feb. 28, 1995; J.A. at 358. Ridder admitted in interrogatories that he was not relying on any written policy, and the magistrate judge found no evidence that the officers' conduct toward Ridder was pursuant to a pattern, much less amounted to a policy, custom, or usage. *Id.* Accordingly, the magistrate judge dismissed the § 1983 claims against Springfield, as well as all other claims against the City and other defendants. Decision, Feb. 28, 1995; J.A. at 365-67.[2]

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[2] In a related appeal on the merits, No. 95-3358, this panel in an unpublished decision affirmed the magistrate judge's entry of summary judgment in favor of all defendants.

On March 28, 1995, one month after the magistrate judge entered judgment in favor of the City, Springfield moved for attorney fees and/or sanctions pursuant to 42 U.S.C. § 1988,[3] 28 U.S.C. § 1927, and Rule 11. Motion; J.A. at 568. Early in the case Springfield had determined that separate counsel would be retained to defend the individual police officers, thereby avoiding conflict inherent in having one attorney represent both the officers and the City. Accordingly, Springfield sought reimbursement for the fees earned by retained counsel and not for the time and effort of the Law Director for the City of Springfield, who represented the City's interests throughout Ridder's suit. Motion at 3; J.A. at 570.

Springfield urged that Ridder's counsel should be sanctioned under Rule 11 for "failing to reasonably investigate, pre-filing, claims made against Defendant City, and for continuing in their claims long after it became, or should have become, clear that there was no factual or legal basis for municipal liability." Motion at 5-6; J.A. at 572-73. Springfield acknowledged the "safe harbor" provision of amended Rule 11 which instructs that a motion should be served on offending counsel twenty-one days prior to any filing with the court, yet the City admitted that it did not serve such a motion on Ridder's counsel Motion at 10; J.A. at 577. Finally, Springfield insisted that by pursuing the case over five years, Ridder's counsel unreasonably and vexatiously multiplied the litigation within the meaning of 28 U.S.C. § 1927. Ridder unsuccessfully moved the magistrate judge to stay decision on Springfield's motion for

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[3] The magistrate judge found Springfield's § 1988 claim untimely and Springfield did not appeal that ruling. Decision, Oct. 11, 1995; J.A. at 613.

sanctions pending appeal to this court of the underlying civil rights action.[4]

On October 11, 1995, the magistrate judge[5] ordered Ridder's counsel, Dwight D. Brannon, to pay the City of Springfield $32,546.02 pursuant to Rule 11 and 28 U.S.C. § 1927.[6] Decision, Oct. 11, 1995 at 7; J.A. at 619. According to the magistrate judge, Ridder's counsel asserted frivolous claims against Springfield at the outset of the case, and continued to maintain the claims without ever developing evidentiary support. *Id.* As to Rule 11's "safe harbor" provision, the magistrate judge reasons:

> The purpose of this requirement in the Rule is to allow a party threatened with sanctions to withdraw an offending paper, thereby avoiding the need to

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[4] Ridder agues that the magistrate judge erred by refusing to grant his request for a stay. As we see it, the denial of the stay enabled the appeal of the sanctions award to be consolidated with the appeal on the merits, without prejudicing either party. Thus, in the present case concurrent consideration of challenges to the merits and the imposition of sanctions avoided piecemeal appeals and laudably conserved judicial resources *See White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445, 454 (1982) (recognizing that prompt decision of an attorney fees claim by district court generally can avoid piecemeal appeals and permit consolidation of appeals). The magistrate judge's denial of the stay was a proper exercise of his discretion.

[5] Although awarding sanctions is a dispositive matter on which a magistrate judge ordinarily makes only a recommendation, *see Bennett v. General Caster Serv. of N. Gordon Co.*, 976 F.2d 995 (6th Cir. 1992), in this case the parties consented to plenary magistrate jurisdiction under 28 U.S.C. § 636(c). *See* Consent to Civl Jurisdiction of U.S. Magistrate; R. 37.

[6] Ridder does not challenge the amount of the sanction.

> litigate the Rule 11 questions. Here the Motion is directed to Plaintiff's counsel's conduct in maintaining the case at all and keeping the City of Springfield in the case from the beginning through summary judgment. Plaintiff has vigorously defended against motions to dismiss and certainly did not withdraw his claims against the City of Springfield when confronted with their motion for summary judgment. Serving Plaintiff's counsel with the Rule 11 Motion 21 days before filing it would have been in this case an *empty formality*. In any event, the requirement does not appear to be jurisdictional; amended Rule 11 does not forbid the award of sanctions when this particular requirement is not met.

Decision, Oct. 11, 1995 at 5; J.A. 617 (emphasis added). Thus, according to the magistrate judge, the failure of Springfield to comport with Rule 11's "safe harbor" provision was essentially harmless.

II. RULE 11 SANCTIONS

A. Standard of Review

In this circuit the test for imposition of Rule 11 sanctions is whether the attorney's conduct was reasonable under the circumstances. *Mann v. G&G Mfg., Inc.*, 900 F.2d 953, 958 (6th Cir.), *cert. denied*, 498 U.S. 959 (1990). We review all aspects of a court's Rule 11 determination for abuse of discretion. *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990); FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments). A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous

assessment of the evidence. *Cooter & Gell*, 496 U.S. at 405.

B. The 1993 Amendments to Rule 11

Originally enacted in 1937 but rarely utilized for over four decades, Rule 11 became a popular tool for regulating attorney behavior following the rule's major overhaul in 1983. The 1983 version of Rule 11 mandated sanctions when an attorney failed to satisfy an objective standard of reasonable pre-filing inquiry into the facts or law underlying a claim. The 1983 amendment was designed to reduce a perceived reluctance of courts to impose sanctions, thereby discouraging dilatory and abusive litigation tactics and streamlining the litigation process. FED. R. CIV. P. 11 Advisory Committee Notes (1983 Amendment). The application of the 1983 version of Rule 11 provoked considerable commentary and was criticized for spawning satellite litigation, abusing the rule's potential as a fee-shifting device, exacerbating incivility among lawyers and between bench and bar, chilling creative advocacy, and disproportionately impacting plaintiffs over defendants, particularly in the civil rights arena. *See, e.g.*, Letter from Hon. Sam C. Pointer, Jr., Chairman of the Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman of the Standing Committee on Rules of Practice and Procedure (May 1, 1992), *reprinted in* 146 F.R.D. 519, 523; William W. Schwarzer, *Rule 11: Entering a New Era*, 28 Loy. L.A. L. REV. 7, 9-12 (1994).

Responding to these concerns, Rule 11 was substantially revised in 1993. The new language broadens the scope of attorney obligations but places greater

constraints on the imposition of sanctions. Under the amended rule:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b). Insofar as the amended rule liberalizes certification standards for factual allegations by validating a potential need for discovery, it reciprocates by embracing a continuing duty of candor: "[I]f evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention." FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments).

Thus, litigants may be sanctioned under the amended rule for continuing to insist upon a position that is no longer tenable.

In a significant turnabout, the amended rule now makes the imposition of sanctions for violations discretionary, rather than mandatory. *See* FED. R. CIV. P. 11(c). In line with Rule 11's ultimate goal of deterrence, rather than compensation, the amended rule also de-emphasizes monetary sanctions and discourages direct payouts to the opposing party. FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments).

C. "Safe Harbor" Provision

The 1993 amendments prescribe specific procedural requirements for the imposition of Rule 11 sanctions, a conspicuous change from the former version. "A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violation [Rule 11(b)]." FED. R. CIV. P. 11(c)(1)(A).[7] In accord with the amended rule, a party

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[7] Ridder agues that Springfield's motion for sanctions was not "separate" because Springfield moved for sanctions and/or attorney fees pursuant to Rule 11, 42 U.S.C. § 1988, and 28 U.S.C. § 1927. We believe Springfield has filed a "separate" motion for sanctions under the meaning of the rule. The drafters instruct that a "separate" motion is one that is "not simply included as an additional prayer for relief contained in another motion." FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments). As we understand it, this requirement is intended to highlight the sanctions request by preventing it from being tacked onto or buried in motions on the merits, such as motions to dismiss or for summary judgment. The requirement does not foreclose combining a Rule 11 request with other provisions regulating attorney behavior, such as § 1988 or § 1927. To require Springfield to request Rule 11 sanctions separate from other requests for attorney fees based on the same conduct would amount to needless

seeking sanctions must follow a two-step process: first, serve the Rule 11 motion on the opposing party for a designated period (at least twenty-one days); and then file the motion with the court. Critical new language directs that the motions for sanctions:

> [S]hall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

Id. In the Advisory Committee Notes, the drafters correspondingly state:

> These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. . . . [T]he timely withdrawal of a contention will protect a party against a motion for sanctions.

FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments). Thus, the 1993 amendments allow for a twenty-one day period of "safe harbor," whereby the offending party can avoid sanctions altogether by withdrawing or correcting the challenged document or position after receiving notice of the allegedly violative

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duplication of paper, time, and effort, for practitioners as well as the courts.

conduct. In that way, the "safe harbor" provision works in conjunction with the duty of candor, giving the proponent of a questionable claim an opportunity to assess the claim's validity without immediate repercussion.

The inclusion of a "safe harbor" provision is expected to reduce Rule 11's volume, formalize appropriate due process considerations of sanctions litigation, and diminish the rule's chilling effect. *See Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449, 452 (E.D.N.Y. 1995); Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 207 (1994). By providing immunity from sanctions through self-regulation, the "safe harbor" period also serves the streamlining purpose that the 1983 architects of Rule 11 originally envisioned. *See* Georgene M. Vairo, *The New Rule 11: Past as Prologue?* 28 LOY. L.A. L. REV. 39, 64 (1994). Undoubtedly, the drafters also anticipated that civility among attorneys and between bench and bar would be furthered by having attorneys communicate with each other with an eye toward potentially resolving their differences prior to court involvement. *See* Schwarzer, *supra* at 20-21.

On the other hand, the creation of a "safe harbor" period minimizes the risks of engaging in inappropriate litigation tactics. Justice Scalia, dissenting from the Supreme Court's adoption of the 1993 amendments to Rule 11, noted as much, believing the revisions render Rule 11 "toothless," in part because the "safe harbor" provision allows for an offending attorney to "escape with no sanction at all. . . .Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose." Amendments to the Federal Rules of Civil Procedure, Dissenting Statement

of Justice Scalia, 146 F.R.D. 507-08 (1993). The "safe harbor" provision has also been criticized as increasing litigation costs by forcing litigants to review, research, and reconsider any pleading that the other party believes may be sanctionable. However, the burden imposed by the new procedure does not appear to be significantly more onerous than that imposed by the prior rule or "the dictates of good professional practice." *See* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL 2D. § 1332 (Supp. 1996).

D. Timing of Rule 11 Motion

The now-discarded 1983 version of Rule 11 designated no particular time for filing a Rule 11 motion. Rather, the Advisory Committee Notes under the 1983 amendment contemplated that, although the court had discretion with respect to when sanctions could be imposed, Rule 11 issues stemming from the pleadings "normally [would] be determined at the end of the litigation." FED. R. CIV. P. 11 Advisory Committee Notes (1983 Amendment). It became settled law, before the 1993 amendments took effect, that a Rule 11 motion could be made after final judgment, subject to local rules establishing timeliness standards. *See Cooter & Gell*, 496 U.S. at 396 (stating that Rule 11 determination may be made after the principal suit has been terminated; upholding sanctions awarded three and a half years after voluntary dismissal); *Runfola & Assoc., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 372 (6th Cir. 1996) (holding that district court did not err in a finding timely a motion for sanctions filed one month after summary judgment). This is no longer the case.

Although the test of the amended rule fails to specify when a Rule 11 motion should be brought, the drafters advise early action:

> The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served *promptly after the inappropriate paper is filed*, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions. . . *a party cannot delay serving its Rule 11 motion until the conclusion of the case (or judicial rejection of the offending contention).*

FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments) (emphasis added). Thus, the 1993 amendments work a significant change in the timing of a Rule 11 motion. By virtue of the fact that under the 1993 amendments, "a Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn," Vairo, *supra* at 65, it follows that a party cannot wait to seek sanctions until after the contention has been judicially disposed. A party must now serve a Rule 11 motion on the allegedly offending party at least twenty-one days prior to conclusion of the case or judicial rejection of the offending contention. If the court disposes of the offending contention before the twenty-one day "safe harbor" period expires, a motion for sanctions cannot be filed with or presented to the court. Any other interpretation would defeat the rule's explicit requirements. Once a motion is properly filed with the court, the drafters prudently permit the court to defer

ruling on the sanctions motion until after the final resolution of the case. *See* FED. R. CIV. P. 11 Advisory Committee Notes (1993 Amendments).

E. Application of 1993 Amendments to Springfield's Motion

As a threshold consideration, we must determine whether the magistrate judge erred by applying the 1993 amendments to Springfield's motion for sanctions. By order of the Supreme Court, the 1993 amendments to the Federal Rules of Civil Procedure, including revisions of Rule 11, took effect on December 1, 1993, governing "all proceedings in civil cases then pending." Order of the United States Supreme Court Adopting and Amending the Federal Rules of Civil Procedure, 146 F.R.D. 404 (1993).

Ridder commenced this action well before December 1, 1993. Springfield moved for sanctions on March 28, 1995, over a year after the effective date of the amendments. Although the sanctionable conduct stemmed from four complaints filed prior to the revision's effective date, Ridder's counsel continued to assert the frivolous claims beyond that date. Moreover, there has been no suggestion that applying the amended rule in this case was somehow infeasbile. Springfield was admittedly aware of the amended version of Rule 11, for the City expressly referred to the amendments in its motion for sanctions, thereby providing notice to Ridder's counsel that Rule 11 had been amended. Therefore, taking into consideration the elapsed time, the parties' awareness of the amendments, and the feasibility of applying the amended rule in the instant case, we agree with the magistrate judge that it was both just and practicable to

apply Rule 11 as amended in 1993 to Springfield's motion for sanctions.

F. Springfield's Motion for Rule 11 Sanctions

There is no question that Springfield failed to comply with the "safe harbor" procedural prerequisite of the amended rule. Springfield admits that it did not serve the motion for sanctions on Ridder's counsel prior to filing the motion with the court:

> Finally, counsel for Defendant City is not unaware of the amendment of Rule 11 effective December 1, 1993, particularly insofar as paragraph (c)(1)(A) now sets forth a procedure for service of a motion upon the offending counsel prior to filing with the Court, and the twenty-one (21) days "safe harbor" provision that is also now in rule 11. Further, the *Defendant City has not served such a motion upon Plaintiff's counsel in this case.*

Motion at 10; J.A. at 577 (emphasis added). Notwithstanding this admission, Springfield insists that complying with the "safe harbor" provision would have been a "vain act," for Ridder's counsel "clearly evidenced a willingness to persist in meritless claims." Motion at 11; J.A. at 578.

Rule 11 cases emerging in the wake of the 1993 amendments have found the "safe harbor" provision to be an absolute requirement. *See Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995) (recognizing that the plain language of the rule indicates that the "safe harbor" provision is mandatory); *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1328 (2d Cir. 1995) (reversing sanctions award in

part because no evidence indicated compliance with "safe harbor" period that current version of Rule 11 specifically mandates); *Thomas v. Treasury Management Ass'n*, 158 F.R.D. 364, 369 (D. Md. 1994) (finding that failure to comply with "safe harbor" absolute prerequisite precludes sanctions); *United Food and Commercial Workers Union Local No. 576 v. Four B Corp.*, 893 F. Supp. 980, 987 (D. Kan. 1995) (sating that Rule 11 "prohibits" the filing of a motion until twenty-one days after the "safe harbor" service), *aff'd*, 83 F.3d 433 (10th Cir. 1996). We agree that the rule is unquestionably explicit with respect to this issue. The plain language of Rule 11 specifies that unless a movant has complied with the twenty-one day "safe harbor" service, the motion for sanctions "shall not be filed with or presented to the court." FED. R. CIV. P. 11(c)(1)(A). Springfield did not comply with the "safe harbor" procedural prerequisite; therefore, the City's Rule 11 motion should not have been presented to the court.

Nonetheless, the magistrate judge found and Springfield argues that the "safe harbor" provision is rendered a mere "empty formality" when a motion for sanctions comes after summary judgment has been granted. We fully agree with that observation. By virtue of its nature, the "safe harbor" provision cannot have any effect if the court has already rendered its judgment in the case; it is too late for the offending party to withdraw the challenged claim. Given the futility of the "safe harbor" provision in this context, Springfield deduces that compliance is unnecessary. This is where we depart from Springfield's logic. Rather than excusing Springfield's noncompliance, we instead hold that Springfield has given up the opportunity to receive an award of Rule 11 sanctions in this case by waiting to file the motion until after the entry of summary judgment. As stated

above, a motion for sanctions under Rule 11 must be served on the offending party for a period of "safe harbor" at least twenty-one days prior to the entry of final judgment or judicial rejection of the offending contention. A party seeking sanctions must leave sufficient opportunity for the opposing party to choose whether to withdraw or cure the offense voluntarily before the court disposes of the challenged contention.

Pragmatic realities require such strict adherence to the rule's outlined procedure. By delaying the motion until after summary judgment was granted, Springfield deprived Ridder's counsel of the "safe harbor" to which the rule says he is entitled. Had Ridder's counsel been allotted his "safe harbor" service, he could have avoided sanction by withdrawing the claims against the City when faced with a potential payout from his own pocket. Neither the opposing party nor the magistrate judge should, with hindsight, step into the attorney's shoes to speculate as to whether the prospect of a fine or other sanctions would have sufficiently motivated the attorney to withdraw the offense. Moreover, had the twenty-one days "safe harbor" period been provided, and Ridder withdrawn his claims, the magistrate judge would have been spared the need to rule on the City's summary judgment motion.

In sum, adhering to the rule's explicit language and overall structure, we hold that sanctions under Rule 11 are unavailable unless the motion for sanctions is served on the opposing party for the full twenty-one day "safe harbor" period before it is filed with or presented to the court; this service and filing must occur prior to final judgment or judicial rejection of the offending contention. Quite clearly

then, a party cannot wait until after summary judgment to move for sanctions under Rule 11.[8]

By filing a motion for sanctions without previously having served the motion on the opposing party for the designated period and by waiting until summary judgment had been entered, Springfield failed to afford Ridder's counsel the twenty-one day "safe harbor" period mandated by the 1993 revised rule. We conclude that the magistrate judge's decision to impose Rule 11 sanctions in this case was based upon an erroneous review of the rule and thus amounted to an abuse of the magistrate judge's discretion. For this reason, we vacate the imposition of sanctions under Rule 11.

III. COUNSEL'S LIABILITY UNDER 42 U.S.C. § 1927

The unavailability of Rule 11 sanctions in the present case does not rule out the possibility that attorney fees were properly assessed against Ridder's counsel pursuant to 28 U.S.C. § 1927. Unlike Rule 11 sanctions, a motion for excess costs and attorney fees under § 1927 is not predicated upon a "safe harbor" period, nor is the motion untimely if made after the final judgment in a case. *See In re Ruben*, 825 F.2d 977, 981-82 (6th Cir. 1987) (finding motion for § 1927 fees filed four months after district judge's entry of

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[8] Our construction of Rule 11's "safe harbor" provision does not in any way preclude the ability of a district or magistrate judge, on his or her own initiative, to enter an order describing the offending conduct and directing the offending attorney to show cause why Rule 11 has not been violated. *See* FED. R. CIV. P. 11(c)(1)(B). There is no corresponding "safe harbor" period for court-initiated sanctions.

judgment and two weeks after dismissal of the appeal timely under "reasonableness" test), *cert. denied sub nom. Swan v. Ruben*, 485 U.S. 934 (1988). Therefore, this avenue for upholding the fee award against Ridder remains viable.

Having found sanctions appropriate under Rule 11, the magistrate judge concluded that he:

> [N]eed not analyze the 28 U.S.C. § 1927 authority as well except to state that it also supports the same award since the conduct of counsel being sanctioned is [sic] pleading the policy claim against Springfield in the beginning and then failing to develop any evidence in support of it. The excess costs incurred by Springfield and recoverable under § 1927 against Mr. Brannon are the same amount to be awarded under Rule 11.

Decision, Oct. 11, 1995, at 7; J.A. at 619. Thus, the magistrate judge did enter a finding that the $32,546.02 fee award was also justified under § 1927, although his explanation leaves little for us to review. In the interest of preventing further delay in this already protracted litigation, we will determine whether a § 1927 fine against Ridder's counsel was warranted. As with Rule 11 sanctions, we review an order awarding attorney fees under § 1927 for abuse of discretion. *Ruben*, 825 F.2d at 984.

Section 1927 provides that any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

Initially, this circuit understood the statute as punishing "an intentional departure from proper conduct, or, at a minimum, . . . a reckless disregard of the duty owed by counsel to the court." *United States v. Ross*, 535 F.2d 346, 349 (6th Cir. 1976). After congress amended the statutory language in 1980, we dispensed with the subjective standard, holding that § 1927 "authorizes a court to assess fees against an attorney for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety." *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986). Fees may be assessed without a finding of bad faith, "at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims." *Id.*

The objective standard enunciated in *Jones* remains sound in this circuit, but we have since reinforced that:

> [S]imple inadvertence or negligence that frustrates the trial judge will not support a sanction under section 1927. There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench, could agree falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expenses to the opposing party.

Ruben, 825 F.2d at 948; *see also Holmes v. City of Massillon*, 78 F.3d 1041, 1049 (6th Cir.) (same), *cert. denied sub nom. Fabianich v. Holmes*, 117 S. Ct. 312 (1996). Under this formulation, the mere finding that an attorney failed to undertake a reasonable inquiry into the

basis for a claim does not automatically imply that the proceedings were intentionally or unreasonably multiplied. *See Ortlett v. Cincinnati Microwave, Inc.*, 954 F.2d 414, 419 (6th Cir. 1992).

We believe that Ridder's counsel, Mr. Brannon, should be liable for excess costs resulting from his initial filing and persistent assertion of meritless claims, conduct that amounted to unreasonable and vexatious multiplication of the proceedings. Mr. Brannon brought suit against the City of Springfield and individual Springfield police officers without any evidence to support a basis for municipal liability, and he persisted in pressing the allegations for over five years, despite unearthing no evidentiary support for the claims even after full discovery. Thus, Mr. Brannon pursued the case against Springfield long after it should have become clear that the claims lacked any plausible factual basis. *See Jones*, 789 F.2d at 1230 (citing with approval a Seventh Circuit case affirming § 1927 sanctions where "an attorney, though not guilty of conscious impropriety, 'intentionally . . . [pursues] a claim that lacks plausible legal or factual basis.'") (quoting *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 233, 226-27 (7th Cir. 1984) (alteration in *Jones*). Under the circumstances, Mr. Brannon's conduct fell short of the obligations owed by a member of the bar and caused considerable expense to the City of Springfield.

An attorney is liable under § 1927 solely for excessive costs resulting from the violative conduct. Mr. Brannon's failure to withdraw the claims against Springfield and the individual police officers forced the City to defend this action for a period in excess of five years. Since we agree with the magistrate judge that Mr. Brannon's unreasonable and vexatious behavior began with the filing of

the complaint and persisted throughout the pendency of the case, the magistrate judge did not abuse his discretion by awarding the full amount of attorney fees incurred by counsel separately retained by Springfield to defend the case against the individual officers, *see infra* Part I. Of the many obstacles encountered during the "procedural odyssey" that became this case, *see* Appellant's Br. No. 95-3358 at 2, we believe many, if not most, are directly attributable to inadequate advocacy by plaintiff's counsel. *See Ridder v. Springfield*, No. 95-3358 (6th Cir. 1997).

We remain sensitive that "[a]n award of attorney's fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones*, 789 F.2d at 1232. It is a function of the intrinsic nature of civil rights action that on occasion plaintiffs may not possess full evidentiary support at the onset. However, a civil rights plaintiff does not have free rein to bring and pursue frivolous claims. Here, Mr. Brannon should have diligently withdrawn the claims against the City upon realizing that he was unable to amass any evidentiary support after five years and full discovery. Moreover, the magistrate judge delivered a poignant warning to Mr. Brannon that he had crossed the line into "unreasonable and vexatious multiplication of proceedings" by imposing a § 1927 liability for filing the second amended complaint, only to rescind that award in response to Mr. Brannon's request for leave yet again to amend the complaint. Surely, at that point, Mr. Brannon should have proceeded cautiously when asserting the same claims in the third amended complaint. Thereafter however, Mr. Brannon continued asserting the same frivolous claims up to and including plaintiff's motion in opposition to summary

judgment, all the while revealing no plausible factual basis for municipal liability.

IV. CONCLUSION

Pursuant to the "safe harbor" provision of the 1993 amendments to Rule 11, a motion for Rule 11 sanctions must be served on the opposing party at least twenty-one days before it is filed with or presented to the court; this "safe harbor" service and delayed filing must be completed prior to final judgment or judicial rejection of the offending contention. Because Springfield did not comply with the twenty-one day "safe harbor" procedural prerequisite before filing its motion for Rule 11 sanctions, the award of sanctions under Rule 11 was improper. Therefore, of the two alternate bases for imposing a fee award against Ridder's counsel in this case, the order of the magistrate judge is **VACATED** to the extent that it imposed Rule 11 sanctions, but **AFFIRMED** insofar as it awarded attorney fees to Springfield pursuant to 28 U.S.C. § 1927.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

STEPHEN MICHAEL RIDDER * CASE NO. C-3-90-003

Plaintiff(s),

-vs- Magistrate Judge Michael R. Merz

CITY OF SPRINGFIELD, OHIO, et al.,

Defendants *

DECISION AND ORDER GRANTING DEFENDANT CITY OF SPRINGFIELD'S MOTION FOR SANCTIONS

Filed October 11, 1995

This case is before the Court upon Defendant City of Springfield's Motion for Attorney Fees (Doc. #272) to which Plaintiff has responded (Doc. #281).

Springfield brings its Motion under three alternative authorizations. Fed. R. Civ. P. 11, 42 U.S.C. § 1988, and 28 U.S.C. § 1927. Although award of sanctions is a dispositive matter on which a magistrate judge ordinarily must make a recommendation, in this case the parties unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c). Compare *Bennett v.*

General Caster Service of N. Gordon Co., Inc., 976 F.2d 995 (8th Cir. 1992) (*per curiam*).

As noted by Plaintiff, the motion under 42 U.S.C. § 1988 is untimely since it was filed March 28, 1995, and judgment on the merits was entered February 28, 1995. As provided by Fed. R. Civ. P. 54(B) and (E), motions for attorney fees must be brought within fourteen days of judgment, except for those brought under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. Insofar as Springfield's Motion is brought under 42 U.S.C. § 1988, it is DENIED.

Springfield claims that it had excess expenses in this case because it was obliged to retain outside counsel for the individual police officers who were sued, apart from the suit against the City itself. Plaintiff takes no issue with the Sixth Circuit law cited by Springfield on the ethical problems involved in joint representation of individual officers and the municipality and this Court finds that it was completely reasonable to retain separate counsel. Furthermore, Plaintiff makes no claim that the amounts charged by Mr. Butz and the time expended by him in the defense of the case were unreasonable and this Court finds them to be so. Mr. Butz is an experienced attorney with an excellent reputation; $100 per hour for his time is completely reasonable.

Until December 1, 1993, Fed. R. Civ. P. 11 provided in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleadings, motion, or other paper and state the

party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of th pleading, motion, or other paper, including a reasonable attorney's fee.

Effective December 1, 1993, the Rule was amended to read:

(b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

(2) the claims, defenses, and other legal contentions thereon are warranted by existing law or by a nonfrivolous argument for the extension,

> modification, or reversal of existing law or the establishment of new law.
>
> (3) the allegations and other factual contentions have evidentiary support of, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence of, if specifically so identified, are reasonably based on a lack of information or belief.

The standard of conduct imposed on parties and attorneys by amended Rule 11 is reasonableness under the circumstances *INVST Financial Group v Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 401 (6th Cir.). *cert. denied*, 484 U.S. 927 (1987); *See also Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 US. 533 (1991); *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987); *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790 (6th Cir. 1988). The court must test the signer's conduct by inquiring what was reasonable to believe at the time of signing, and must avoid using the "wisdom of hindsight." *Mann v. G&G Mfg., Inc.*, 900 F.2d 953 (6th Cir.). *cert. denied*, 498 U.S. 959 (1990); *Century Products, Inc. v. Sutter*, 837 F.2d 247 (6th Cir. 1988); *INVST, supra*, at 401; *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988). The Rule includes both a duty to investigate the facts. *Albright v. Upjohn*, 788 F.2d 1217 (6th Cir. 1986), and the law, *INVST, supra*, at 402.

The gravamen of Springfield's Motion is that Plaintiff's counsel sued the City itself under 42 U.S.C. § 1983, but never produced any evidence that the individual defendant officers were acting pursuant to custom, policy, or

usage. At the pleading stage, Plaintiff kept the City in the case by relying on *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. _____, 113 S. Ct. 1160, 122 L.Ed. 2d 517 (1993), which allows a claim against a municipality to be simply in terms that the individual officer's conduct conformed to official policy, custom, or practice. But *Leatherman* is only a decision about the adequacy of pleading such a claim. It does not purport to exempt from Rule 11 sanctions an attorney who alleges that particular officers' unconstitutional acts were pursuant to custom, policy, or usage, but has not made the requisite pre-pleading or post-pleading investigation to permit him to make that allegation. Plaintiff here had the benefit of full discovery against the City and never produced any evidence of an unconstitutional policy, custom, or usage. As Springfield points out, Plaintiff had retained the service of an expert police investigator very early in the case, but Mr. Emmons never found any unconstitutional policy, custom, or usage.

Plaintiff's counsel defends against the Motion by reciting several pages of evidence of unconstitutional behavior by the individual defendant officers (Doc. #281, pp. 2-6). That evidence is beside the point of the Motion. It has been clearly established law for some time that an unconstitutional policy, custom, or usage cannot be inferred merely from unconstitutional conduct on one occasion. *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L. Ed. 2d 791 (1985). Instead, policy must be proven by showing decisions of policymakers. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). Whether a particular official has final policymaking authority is a

question of sate law. *Pembauer, supra; St. Louis v. Paprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 106 L. Ed. 2d 598 (1989). Identification of the official whose decisions represent the official policy of a particular local governmental unit is a question of law to be decided by the judge. *Jett*, 491 U.S. at 737. The policy must be deliberate and discernible. *Molton v. City of Cleveland,* 839 F.2d 240 (6th Cir. 1988), *cert denied,* 489 U.S. 1068 (1989). The most that Plaintiff ever argued here was that policy could be inferred from the involvement of several officers. That is simply not enough, nor is it supported by a "good faith argument for extension of the law", indeed, Plaintiff has never attempted to make such an argument here.

Plaintiff makes a number of procedural objections as well.

Plaintiff's objection that the request for Rule 11 sanctions is not properly set forth in a "separate" motion is not well taken. The purpose of that requirement, as the Court understands it, is to prevent having such requests buried in motions to dismiss or for summary judgment. Here the request for sanctions was set forth separately from other requests for relief, but on alternative bases. It would be a useless multiplication of appear to require § 1927 and 1988 requests to be separated from Rule 11 motions, at least in the context in which this Motion was made.

Plaintiff also objects that Springfield did not serve the Motion 21 days before filing it as Rule 11 requires. The purpose of this requirement in the Rule is to allow a party threatened with sanctions to withdraw an offending paper,

thereby avoiding the need to litigate the Rule 11 questions. Here the Motion is directed to Plaintiff's counsel's conduct in maintaining the case at all and keeping the City of Springfield in the case from the beginning through summary judgment. Plaintiff had vigorously defended against motions to dismiss and certainly did not withdraw his claims against the City of Springfield when confronted with their motion for summary judgment. Serving Plaintiff's counsel with the Rule 11 Motion 21 days before filing it would have been in this case an empty formality. In any event, the requirement does not appear to be jurisdictional; amended Rule 11 does not forbid the award of sanctions when this particular requirement is not met.

Plaintiff is simply wrong in arguing (Doc. #281 at 17) that a Rule 11 motion must be made before judgment. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990); *Metracorps, Inc. v. Eastern Massachusetts Jr. Drum & Bugle Corps. Ass'n.*, 912 F. 2d 1 (1st Cir. 1990); *Community Elec. Service of Los Angeles, Inc. v. national Elec. Contractors Assn's, Inc.*, 869 F.2d 1235 (9th Cir.). *cert. denied* 110 S. Ct. 236, 107 L. Ed. 2d 187 (1989).

Finally, Plaintiff's counsel argues that the amended Rule 11 "seems to retain the 'bad faith' standard" (Doc. #281 at 18). The bad faith standard was removed from Rule 11 with the 1983 amendments and there is nothing in the 1993 amendments to suggest that it has been restored. Compare *INVST Financial Group v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 401 (6th Cir.). *cert. denied*, 484 U.S. 927 (1987) with Advisory Committee Note to 1993 Amendments, stating that subdivision (b)(2) "establishes an objective standard, intended to eliminate any

'empty-head pure-heart' justification for patently frivolous arguments." It is important to note also that Springfield does not claim the entire lawsuit was frivolous, but only the "policy" allegations against Springfield, which had no basis in fact either when the case was filed in 1990 or when the summary judgment motions became ripe in 1995.

Having determined that sanctions are appropriate, it remains to decide what form they should take. The 1993 Amendments specifically provide

> A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (1) and (B) [not material here], the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or if imposed by motions and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

Fed. R. Civ. P. 11(c)(2).

In this Court's opinion, the best way to deter unacceptable conduct by anyone is to require that person to compensate someone injured by the conduct, i.e., to be responsible after the fact when they were not sufficiently responsible before the fact in calculating the costs imposed on others. Particularly when a piece of litigation represents and **investment** decision by an attorney - - when the attorney finances substantial pre-trial preparation of a case without any realistic expectation that his client will be able to repay him if the case is unsuccessful - - other parties should

not be required to bear the risk of frivolous conduct in support of the investment and compensatory awards under Rule 11 are most likely to deter the attorney in question and others similarly situated from engaging in similar conduct. In other words, a compensatory award to Springfield is particularly appropriate to serve the deterrence functions here.

Additional factors which weigh in favor of a substantial monetary award are the experience of Plaintiff's counsel who has many years in practice and a reputation as one of the most financially successful attorneys in the Dayton bar. It is noteworthy that Springfield cites evidence of this fact in its Motion for Sanctions and Mr. Brannon has done nothing in response to call that into question.

Having concluded that sanctions are appropriate under Rule 11, the Court need not analyze the 28 U.S.C. § 1927 authority as well except to state that it also supports the same award since the conduct of counsel being sanctioned is pleading the policy claim against Springfield in the beginning and then failing to develop any evidence in support of it. The excess costs incurred by Springfield and recoverable under § 1927 against Mr. Brannon are the same amount to be awarded under Rule 11.

Pursuant to Fed. R. Civ. P. 11(c)(3), the Court concludes it was frivolous for Mr. Brannon to assert a policy, custom, or usage claim against the City of Springfield at the outset of the case because he had no evidentiary support for that claim and it was further frivolous for him to continue to maintain that claim, through and including opposing Springfield's motion for summary judgment, because he had never developed any evidentiary

support for that claim. The basis for the sanction imposed is as described above. No sanction is sought against Mr. Ridder personally. The sanction imposed herein is levied against Mr. Brannon rather than Mr. Lopez because of statements in the record about their respective roles in the litigation and the Court's observations about those roles, particularly with respect to the policy claim.

Accordingly, it is hereby ORDERED, pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927, that attorney Dwight D. Brannon pay to the City of Springfield the sum of $32,546.02 forthwith.

/s/_____
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

October 11, 1995